No. 3426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN ADMIRALTY

HIND, ROLPH & COMPANY, a Copartnership, and 1,727,783 Feet of Lumber Loaded on Board the Schooner "Levi W. Ostrander," and Fidelity Deposit Company of Maryland, a Corporation,

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

OPENING BRIEF FOR H. F. OSTRANDER, APPELLEE AND CROSS-APPELLANT

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STATEMENT OF THE CASE

There are two appeals in this case. The question involved in this particular appeal is whether the

Trial Judge was correct in denying Mr. Ostrander's claim for demurrage for the period from August 25th to October 13th, 1917. The Trial Judge found that:

> "The notice of August 13th that the vessel would be ready August 25th is not sufficient to give the vessel a status of 'arrived ship.'" (444.)*

It is not entirely clear to us just what the Court meant. It may be that he meant that a certain notice given on August 13th was not sufficient notice of the boat's readiness to load. In view of the fact that this was one of the contentions made at the time of trial, we are of the opinion that this is what the Court meant by its rather ambiguous statement. It may be, however, that the Court meant that irrespective of the sufficiency or insufficiency of the notice, nevertheless the schooner was not an "arrived ship" until she arrived at Port Angeles. We shall, therefore, discuss the question in this brief in both aspects.

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* (Throughout this brief, numbers in parenthesis refer to pages of Apostles.)

WHAT ARE THE FACTS?

On May 15th, 1917, H. F. Ostrander, then acting as agent for the owners of a sailing vessel then building in the Seaborn Yards, at Tacoma, Washington, and Hind, Rolph & Company of San Francisco entered into a contract of charter party. The form of charter-party was prepared and printed by Hind, Rolph & Company. The provisions of the charter-party material to this particular appeal are as follows:

> "This charter-party, made and concluded upon in the city of San Francisco, Cal., this 15th day of May, 1917, between H. F. Ostrander, Agents for Owners of the Sailing Vessel known as No. 4 of the burthen of.....tons or thereabouts, register measurement, now building at Seaborn Yards, Tacoma, Washington. (Lumber capacity about 1,750 M. ft. B. M.) Wherefrom vessel shall proceed direct in ballast to a loading place on Puget Sound, *to be designated by Charterers prior to June 30th, 1917,* under this Charter, of the first part, and Hind, Rolph & Company of San Francisco, of the second part: WITNESSETH: That said party of the first part agrees on the freighting and chartering of the whole of said vessel, * * *. (Civil commotions, floods, fires, strikes, lockouts, accidents on railways and/or docks and/or wharves, or any other hindrances beyond the control of either party to this agreement or their agents always mutually excepted) unto said party of the second part, for a voyage from a usual safe loading place on Puget Sound (Washington) as *ordered* by charterers or their agents to one port in South Africa. * * *

"For each and every day's detention by default of said party of the second part, or their agents, Two Hundred and Fifty Dollars ($250.00) per day shall be paid day by day, by said party of the second part, or their agents, to said party of the first part, or agent. * * *

"s. Should vessel not have arrived at port of loading (as above), on or before 12 o'clock, noon, of the 31st day of August, 1917, Charterers to have the option of cancelling or maintaining this charter, on arrival of vessel. Lay days not to commence before 1st day of July, 1917, unless at Charterers' option."

At this point we may say that all the testimony relative to the questions involved in this particular appeal is contained in the form of letters and telegrams passing between the respective parties.

The original exhibits in this case have not been printed in the Apostles on Appeals, but by stipulation were sent to the Clerk of this Court. A majority of the letters and telegrams, however, are contained in the answers made by Mr. Ostrander to the first, second and third interrogatories attached to the answer, and will be found on pages 30 to 44, of the Apostles on Appeals. We shall, however, in this brief throughout refer to such letters and telegrams by the Exhibit numbers given them by the Clerk of Court at the time of trial.

The first material letter is that of May 26th, in which Hind, Rolph & Company say:

"In order to arrange for *the despatch,* in accordance with the charter, at the loading port, we have had to agree that the vessel would load at *two* mills. The two mills, of course, will be in the same district, so that the shift can be made within a very short time. In view of this circumstance, we hope that in due time you will be able to permit loading at a second mill." (Libelant's 1-B.)

On June 20th, 1917, Hind, Rolph & Company again wrote Mr. Ostrander. They said:

"In regard to the July-August sailer which we chartered from you for South Africa, will you kindly give us an idea, as far as it is possible for you to do so at the present time, of what her carrying capacity will be, also how much she is expected to carry on deck? We should also like to know the name of the vessel as soon as she has been named *and also whether there has been any change in her anticipated date of loading."* (Libelant's 1-C.)

On June 28th, 1917, Mr. Ostrander replied:

"The vessel chartered you for July-August loading will be named the 'LEVI W. OSTRANDER.' She is expected to be launched between the 10th and 20th of July. * * *

"You wrote some time ago asking for the privileged of two loading ports, and while I should very much prefer to load at one I will, of course, in case of absolute necessity, agree to a second. * * *" (Libelant's 1-D.)

On July 2nd, Hind, Rolph & Company wrote Mr. Ostrander:

> "* * * In regard to the loading, would say that it has been necessary for us to receive this cargo at two ports so that with your permission we will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills and Timber Company, Port Angeles. * * *
> "We will now thank you to let us know as early as possible just when you expect the vessel will be ready to load." (Libelant's 1-E.)

On August 13th, 1917, Mr. Ostrander sent the following telegram:

> "Schooner Levi W. Ostrander will be ready for cargo by August twenty-fifth. Will you notify mills to have cargo ready and are you now prepared to name port of discharge?" (Libelant's 1-F.)

On the following day Hind, Rolph & Company acknowledged receipt of the telegram of August 13th and after quoting it continued as follows:

> (We) "beg to advise that we are *notifying the mills that the Schr. 'Levi. W. Ostrander' will be ready to load by August 25th.*
>
> "Owing to the strike situation, we do not know at present just how far the mills have gotten along with this cargo but we have asked to be definitely advised and will let you know as soon as possible all particulars. * * *" (Libelant's 1-G.)

Two days later Hind, Rolph & Company again wrote Mr. Ostrander as follows:

"With further reference to our respects of the 14th inst. regarding the loading of this vessel, we are just in receipt of the following letter from the Douglas Fir Exploitation & Export Co., from whom we have purchased the cargo:

"'Acknowledging your favor of the 14th, this cargo has been placed by us with The Charles Nelson Co., who in turn placed it with the Port Angeles Mill, but now that the strike has come on since this has been done, it is just possible that when the labor troubles are over and the mills are again able to operate, they may want to cut part of it at Mukilteo and part at Port Angeles, which will be their privilege to do. If, however, the vessel insists on going to the mill, she may go to Port Angeles, but her laydays cannot commence to count until the mill is able to take care of her, this, on account of the general strike. *We, however, accept your notice of the 14th as evidence that the vessel is ready to load during August.*'

"We are sorry that owing to the strike situation, there is a possibility of the vessel being delayed but hope that the mills will be able to load the vessel when she is ready." (Libelant's 1-H.)

On August 20th, Mr. Ostrander wired Hind, Rolph Company as follows:

"Your letter sixteenth in view of position taken by Douglas Fir Company it seems clear we cannot expect to secure cargo for Levi W. Ostrander for several weeks. I think therefore you should either arrange for lumber from mills now running or agree to cancellation of charter on terms fair to us both. Kindly wire promptly your ideas latter suggestion." (Libelant's 1-J.)

Hind, Rolph & Company immediately replied as follows:

> "Regret our inability reply definitely now but have submitted situation to buyers asking their best proposal if in position to cancel." (Libelant's 1-K.)

On the same day they followed this telegram with a letter confirming the telegram sent out August 20th, and saying:

> "* * * The situation is very annoying, which we deeply regret and if there is anything that we can do ourselves to help matters along, we will be only too pleased to do so. We hardly think, however, that the buyers will agree to any cancellation because since the cargo was sold, *prices have somewhat advanced* and the purchase will no doubt turn out very satisfactorily from their standpoint." (Libelant's 1-I.)

On August 25th, Hind, Rolph & Company advised Mr. Ostrander that their African buyers would not consider cancellation of the charter under any circumstances. (Libelant's 1-L.)

No other correspondence passed between the parties until September 14th, 1917, when Mr. Ostrander sent the following telegram to Hind, Rolph & Company:

"Schooner Levi W. Ostrander having been *ready for cargo since August twenty-fifth,* I am disappointed in that you are apparently quite content to await the pleasure of the Charles Nelson Co., who I understand are diverting their own vessels to other mills. Other manufacturers are making attempts to fill commitments and getting results. Naturally I cannot permit matter to drag in this manner and unless you are now able to promise delivery of cargo definitely and within a reasonable specified time, would request you to forward immediately copy of your purchase contract. Will then decide on course to follow and advise you." (Libelant's 1-M.)

Hind, Rolph & Company then replied as follows:

"Your dayletter today. It is difficult for us to assist matters to any great extent from this end but suggest you communicate with Mr. A. A. Scott manager of Charles Nelson mill either at Mukilteo or Port Angeles regarding the loading. We are pressing mill constantly but they are protected by strike clause in lumber contract of which we are mailing you copies today as per your request. Believe best results are obtainable by your communicating with Mr. Scott personally." (Libelant's 1-N.)

It will be noted that Hind, Rolph & Company had, as early as August 16th, 1917, taken the position that the exception clause in the charter-party released them from any liability for demurrage as long as a strike existed at the logging camps or the mills. They apparently assumed, throughout the entire controversy, that because the Douglas Fir

Exploitation and Export Company was free from any liability to them by reason of a provision in the sale contract between the Douglas Fir Expolitation and Export Company and Hind, Rolph & Company, or the sale contract between the Douglas Fir Exploitation and Export Company and the Charles Nelson Company, that they were free from any liability to Mr. Ostrander.

Without further comment we again turn to the correspondence. On the same day on which the last preceding telegram was sent, Hind, Rolph & Company sent to Mr. Ostrander a copy of their contract with the Douglas Fir Exploitation & Export Company and of the contract with the Charles Nelson Company. (Copies of these contracts were introduced in evidence at the time of trial and are designated as Libelant's 1-Q and 1-R.)

Continuing, Hind, Rolph & Company say:

> "The question of getting the 'Ostrander' loaded at the earliest possible moment is by no means being neglected by us but inasmuch as we are *legally powerless,* it is difficult to make any appreciable headway without the strike situation improving decidedly." (Libelant's 1-P.)

As requested by Hind, Rolph & Company, Mr. Ostrander communicated with Mr. Scott of Charles Nelson Company and as a result of his communica-

tion wired Hind, Rolph & Company on September 15th as follows:

> "Night letter received. Have talked with Scott who has nothing encouraging to say but *intimates* that in all *probability* his plant is *about* to be *commandeered* by the Government in which case of course I shall consider your charter cancelled." (Libelant's 1-O.)

To this message Hind, Rolph & Company replied on September 17th as follows:

> "Have conferred with Douglas Fir Company. Are informed that your vessel will be loaded as quickly as conditions make it possible. They know nothing of mills being commandeered by Government but think this would only apply to mills able to cut Government spruce. Will do everything possible expedite matters but must protest against and will not consent cancellation this charter." (Libelant's 1-S.)

Immediately upon receipt of the foregoing telegram, Mr. Ostrander wired as follows:

> "Referring our charter May fifteenth of vessel now named Levi W. Ostrander and of *our notice* to you that *vessel* would be *ready commence loading August twenty-fifth in accordance with charter* and to the fact that you have so far failed to notify us of your ability to furnish cargo you are now hereby notified that I will claim demurrage at rate mentioned in charter from and after August twenty-fifth and until such time as you commence furnishing cargo in accordance with charter also that unless demurrage fully paid any bills of lading issued will have full claim for demurrage indorsed thereon." (Libelant's 1-T.)

On September 20th, Hind, Rolph & Company sent a telegram to Mr. Ostrander, the material portion of which is as follows:

> "Your nightletter of nineteenth regarding charter of Levi W. Ostrander received and our recommendation is that you confer with Mr. Scott placing your vessel in his hands and *waiving your alleged claim for demurrage.* We are sure he will assist you all possible in view of the clause in the charter party with reference to strikes and the existing condition throughout the lumber district we cannot admit of any demurrage due and will not permit any endorsement of demurrage to be made on bills of lading." (Libelant's 1-U and V.)

On the same day Hind, Rolph & Company wrote a letter to Mr. Ostrander, the material portion of which is as follows:

> "The charter party provides that in the case of strikes, both owner and charterer are mutually relieved of their responsibilities pending a settlement. As you know, there is now and has been for some time past a serious strike in the lumber mills and camps throughout the Puget Sound district. *While it is admitted that some of the mills are now endeavoring to operate,* nevertheless it cannot be said that the strike has been settled. None of the mills are operating at anywhere near their capacity and while this condition lasts there is very little that can be done to assist the loading of your vessel or any other. We have done our utmost here with both the Charles Nelson Co., from whom we have bought this cargo, and also with the Douglas Fir Company through whom the cargo was originally purchased. They have

assured us from time to time that they will do everything in their power to give this vessel rapid despatch.

"In reply to your wire today regarding your alleged claim for demurrage, this we cannot admit, nor can we allow any demurrage to be endorsed on the Bills of Lading because there is no demurrage due and cannot be any under the present conditions. We have suggested that you communicate again with Mr. Scott, place your vessel entirely in his hands, *waiving your claim for detention* and alleged demurrage and let them do the best that they can. We think that this is the only satisfactory method to follow out under the curcumstances. We have also advised you in our message that we are doing this same thing on the vessels which we own and which are ready to load but cannot secure their cargoes on account of the strike." (Libelant's 1-W.)

On September 22nd, 1917, Mr. Ostrander wired Hind, Rolph & Company as follows:

"Absence from city delayed my answering your day letter twentieth re charter Levi W. Ostrander I consider vessel now on demurrage as per my wire to you nineteenth which I reaffirm STOP *Will move vessel to any port on Puget Sound only on receiving orders so to do from you* STOP I have no relations with parties who are to furnish you cargo and if they have protected themselves by strike clause that question is between you and them STOP It is your duty to furnish the vessel cargo and strike clause in charter has no reference to a dispute between mill owners and their employees STOP. My counsel advise me that strike clause in charter relates only to matters

affecting completion of vessel loading by stevedores getting crew and similar matters and that lumberman's dispute is too remote a cause to bind me under charter or relieve you from demurrage STOP You certainly cannot expect hold vessel indefinitely without paying demurrage because there is labor trouble at a particular mill which you have selected to cut a particular order STOP Inasmuch as my suggestion cancellation charter as way out of difficulty was declined by you I trust you will now give *definite order to proceed to loading port.*" (Libelant's 1-X.)

To the last mentioned telegram, Hind, Rolph & Company sent the following reply:

"Your dayletter Saturday received today and in reply we can only reiterate what we have previously told you STOP We have also previously given you loading orders and the vessel may proceed to the mill when ready and if you care to act on our previous suggestion mill will take one vessel and do best possible but if you don't do this then mill will stand on their legal rights STOP Think your reference to strike clause is in error as it does not mention anything specifically as to stevedores, crews, etc., but it does specifically provide that hindrances beyond the control of either parties are mutually excepted. We regret condition of affairs very much but we were not instrumental in any way and until strike is settled and conditions are again normal we are powerless to do anything." (Libelant's 1-Y-Z.)

On September 25th, Hind, Rolph & Company wrote a letter to Mr. Ostrander, the material portion of which is as follows:

> "We are sorry we cannot agree with your counsel's advice in regard to the strike clause affecting this charter. There are at least a dozen vessels on Puget Sound at the present moment which are in a similar position to the 'Levi W. Ostrander,' and to our positive knowledge they are all being treated the same way. Even though the particular reference to the strike clause in the Charter Party was not binding as between the mill and the vessel, *the further clause in regard to hindrances of any kind would certainly prove applicable in this case.*" (Libelant's 1-A[1].)

On October 1st, Mr. Ostrander telegraphed Hind, Rolph & Company as follows:

> "In re Ostrander charter my counsel Hughes, McMicken, Ramsey and Rupp suggest that you call your own counsel's attention to sections two hundred fifty-two to two hundred fifty-seven B and cases cited fifth edition Carvers Carriage by Sea. They advise me that neither the strike clause nor any other hindrances clause under the facts relating to lumbermen's dispute with their employees and the general conditions that have obtained on Puget Sound relieve you from liability for demurrage since August twenty-fifth." (Libelant's 1-B[1].)

To this telegram Hind, Rolph & Company made reply by letter on October 4th, the material parts of which are as follows:

> "Referring to your night lettergram of October 1st, 1917, we have acted upon your suggestion and have called our Counsel's attention to your contentions, and the authorities cited by your counsel, and are now in a position to

say that we are advised that you *have no legal right to demurrage under the Charter Party of May 15th, 1917,* and under the present circumstances. * * *

"We shall furnish the cargo to the vessel at the wharves of the *Crown Lumber Co.* at Mukilteo and the *Puget Sound Mills & Timber Co., Port Angeles,* as soon as the conditions resulting from the strike permit. Just when that will be possible is a matter beyond our control to determine definitely at this moment; but we assure you that we are anxious to be in a position to furnish this cargo with the least possible delay.

"As soon as conditions at the wharves named have become such that the cargo can be delivered to the vessel as fast as she can receive it, we will notify you of that fact so that you may then proceed to the first loading place at Mukilteo, in case you desire to keep the vessel at Seaborn Yard, Tacoma, until then.

"We would suggest again, however, that the vessel would save time if, instead of waiting at Seaborn Yard after being ready to load, she proceeded to the loading wharf at Mukilteo and there accepted the cargo as fast as the Mill will deliver it. We are assured by the Mill that it will use its best efforts to give you all possible despatch in the delivery of the cargo. In case, however, the vessel proceeds to the Mill before receiving our notice that the cargo will be delivered there as fast as vessel can receive it, *it must be understood that you thereby waive provision "T"* (line 81) *of the Charter Party and claims to demurrage."* (Libelant's 1-D[1].)

No further communication passed between the parties until October 12th, when Hind, Rolph & Company wired Mr. Ostrander as follows:

> "Owing to the supply of logs and the general ability of the Port Angeles Mills and Timber Company Port Angeles Washington to *manufacture with dispatch the cargo* for the Levi W. Ostrander would now advise in case you have not acted on our previous instructions that this vessel be ordered to the Port Angeles mill when she is ready to load cargo. We are *informed* that work is still being done completing this vessel. Will you kindly telegraph us if this is correct and if so when the vessel will be ready to receive lumber at Port Angeles." (Libelant's 1-E[1].)

An immediate reply in the following form was made by Mr. Ostrander:

> "In accordance your today's wire have ordered tug to take Levi W. Ostrander from Tacoma tomorrow for Port Angeles. *Vessel has at all times since August twenty-fifth been ready to load cargo* and I now repeat former notice that demurrage will be claimed from that date." (Libelant's 1-F[1].)

A tug was procured and the schooner towed to Port Angeles. She arrived there on Sunday, October 14th. Upon the arrival of the schooner at the mill at Port Angeles, Charles Nelson & Co., refused to furnish any lumber until the Captain signed a demurrage release. A dispute concerning this matter consumed two days. Immediately thereafter

Charles Nelson Co., in breach of the provisions of the Charter-Party, refused to permit any stevedores, except such as were employed by them, to load the boat. Their alleged reason for this action was that the stevedores in their employ had charge accounts in the Mill Company's store and that the only way the Mill Company had to get its money out of these men was to give them employment. (173). Moreover, they demanded that the Captain of the Ostrander pay to the Mill Company ten per cent more than the wages of the stevedores. This dispute also consumed two days.

This dispute was finally settled by the Captain employing the stevedores of the Mill Company and Hind, Rolph & Company paying the additional ten (10) per cent.

On the morning of the 18th the schooner commenced loading. The Trial Court found "that the vessel could readily have been loaded in fourteen days." (445.) She was not, however, loaded until November 24th.

ARGUMENT

As we pointed out at the inception of this brief, the Trial Court refused to allow Mr. Ostrander's claim for demurrage for the entire period from

August 25th to October 14th because the notice of August 13th that the vessel would be ready August 25th was not sufficient to give the vessel a status of "arrived ship."

Just what the Court meant by this statement we are frank to say we do not know. We take it that it is the law that in order for a vessel owner to recover demurrage he must notify the charterer in some manner that the vessel is ready for loading. We quite agree, however, with Proctor for Cross-Appellees that the mere giving of a notice, though sufficient in form, is generally not all that is required to give the vessel the status of an arrived ship. If such were the case then a vessel which was to load at Shanghai could give notice to the charterer that the vessel would be ready to load at Shanghai on a certain date, even though the vessel at the time of the giving of the notice was in New York City. Again, we agree that such is not the law, but that in the ordinary case the vessel, in order to be considered an arrived ship, must arrive at the precise place designated in the Charter-party before her demurrage days can commence to run. We admit that if the charterer in this case had ever given us a definite, positive and unqualified order to send the schooner to a definite loading place that then the schooner would have been obliged to arrive

at such place before any demurrage could be claimed, except in the event that compliance with such order was waived by the charterer.

We say this much at the outset in order that our position may immediately be made plain and clear.

It may be that the Court meant by the language above quoted that a notice that a boat would be ready to proceed to a loading place on a day certain was insufficient and that the only sufficient notice was one which in terms announced that the boat was in fact at that moment ready. Or it may be that he meant that even if the notice given on August 13th, was sufficient nevertheless the vessel could not claim demurrage until she actually arrived at a loading place, even though the charterer never gave to the vessel owner a direct, positive and unqualified order to proceed to any definite loading port.

Even if it be a fact that the Court's opinion was based upon the first proposition alone, it nevertheless is true that Cross-Appellees in this case insisted in the lower Court that no recovery for demurrage for the period in question could be had because the vessel did not arrive at Port Angeles until October 14th. For that reason we will discuss both questions in this brief, though in order to

discuss the second question it will be necessary to anticipate the argument which conusel for Cross-Appellees will make.

THE NOTICE OF AUGUST 13TH WAS SUFFICIENT

The Charter-party does not prescribe any form in which the notice must be given or the time in which it is to be given. As a matter of fact the Charter-party makes no mention of notice of readiness at all. The boat, at the time of the execution of the Charter-party, was incomplete. In view of such circumstances we think it only natural that the notice which one would expect a ship owner to give would be a notice specifying when the boat would be ready to load her cargo. The notice in such case therefore would be given a few days in advance of the time when the boat would be ready. Moreover, we think that Hind, Rolph & Company expected to receive just the notice which was received by them. In their letter of July 2nd, 1917, (Libelant's 1-E) Hind, Rolph & Company say:

> "We will now thank you to let us know as early as possible just when you expect the vessel will be ready to load."

In compliance with this request Mr. Ostrander sent his telegram. This telegram of August 13th

was accepted by Hind, Rolph & Company as sufficient notice for on August 14th they wrote Mr. Ostrander and after quoting the telegram of the 13th said:

> (We) "beg to advise that we are notifying the mills that the Schr. 'Levi W. Ostrander' will be ready to load by August 25th." (Libelant's 1-G.)

Again, two days later, Hind, Rolph & Company wrote Mr. Ostrander and quoted a letter, or portion thereof, received by Hind, Rolph & Company from the Douglas Fir Exploitation & Export Co., in which the Douglas Fir Company said:

> "We, however, accept your notice of the 14th as evidence that the vessel is ready to load during August." (Libelant's 1-H.)

Now no question was ever made by Hind, Rolph & Company that the notice of August 13th was not a sufficient notice. They proceeded throughout on the theory that they were relieved from liability because of the strike clause in the Charter-party. They did not say to Mr. Ostrander: "We do not consider your notice of August 13th sufficient; that the only notice which will be sufficient is one which will be given when the boat is ready to receive cargo." If they had done so a notice of that character could and would have immediately been sent on August 25th. What they did say was: "We

accept your notice as a sufficient one. We cannot furnish cargo to your boat on August 25th because the cargo, by reason of the strike, will not exist."

EVEN IF NOTICE WAS INSUFFICIENT, THE GIVING OF A SUFFICIENT NOTICE WAS WAIVED BY HIND, ROLPH & COMPANY.

As we have said, notice of readiness to load was not, under the form of Charter-party in question, a condition precedent to be performed by the ship-owner, but even if it had been such a condition, compliance therewith was waived by Hind, Rolph & Company. The giving of a notice of readiness to load or discharge, even under a Charter-party requiring such notice, is to enable the charterer to be ready either to furnish the cargo or to receive it. What good purpose would have been served by Mr. Ostrander's giving a notice on August 25th? He had already been advised that no cargo could be furnished the schooner on that day or for some time thereafter. The charterer had informed him that they had notified the mills that he would be ready to receive cargo on August 25th. More than that, *they had accepted the notice as sufficient.* Now, if the charterer is informed that the ship is ready, if he receives such information either by formal notice being tendered to him or *in some*

other way, the ship owner has discharged the duty imposed upon him even though the Charter-party requires the giving of a formal notice.

In 268 Logs of Cedar, 2 Lowell, 378, 379, the Court said:

> "I do not understand that any formal notice need be given, if the brig was ready, and the *consignees knew it.* The master's notice would not bring on the lay days if the ship was not ready, and his failure to notify in form would not put them off, *if the other party was fully informed of the ship's being ready.*"

Again, in *Washington Marine Co. vs. Rainier Mill & Lumber Co.,* 198 Fed 142, 146, Judge Wolverton said:

> "A question has arisen respecting the notice to be given under the *stipulations* of the *charter parties* of the ship's readiness to begin discharging her cargo. I find that no notice was given in that respect as it pertains to any of the voyages, but I further find that the respondent was ready with its men to receive the lumber at the time the ship began discharging in each instance, *and that this fact constituted a waiver of the notice.*"

IT WAS NOT OUR FAULT THAT THE SCHOONER WAS NOT AN ARRIVED SHIP ON AUGUST 25TH.

As we have said before, we are compelled to anticipate on this question the argument of counsel

for Cross-Appellees. An elaborate brief, however, on this question was filed by him with the Trial Court. We have no doubt that the same position will be taken in this Court and we therefore proceed to demonstrate that the contentions made there, and which will be made here, are unsound. The general rule is, no doubt, that if a loading place is definitely named in the charter-party or if the charter-party gives the charterer a right to designate a loading place, then the vessel must proceed to the place either named in the charter-party or designated by the charterer before her lay days commence to count. The occasion for the general rule arises from the fact that the terms and conditions in charter parties relative to loading may be divided into three classes. These three classes of terms and conditions are set forth in Sec. 273 of the articles on Shipping and Navigation in Halsbury's Law of England (Vol. 26, p. 182):

> "(1) The charter-party may stipulate simply that the ship is to arrive at the specified port, without any further particularity or qualification. In this case the word 'port' must not be applied in its geographical, fiscal, or pilotage sense; the ship has not necessarily arrived within the meaning of the charter-party because she is within the geographical or legal limits of the port. The word must be construed in a commercial sense as meaning the commercial area known and treated as the port by all persons engaged in the shipping of

merchandise, whether as shippers, charterers, or ship-owners. The ship is not, therefore, to be considered as having arrived until she has reached the usual place in the port at which loading vessels lie. When she has reached this place the shipowner's duty has been fulfilled; *it is not necessary that the ship should actually be in the particular part of the port in which the particular cargo is to be loaded.* * * *

"(2) The charter-party may specify an area within a port, such as, for example, a basin, a dock, or a certain distance or reach of shore on the sea coast or in a river. In this case the ship is not an arrived ship within the meaning of the charter-party until she is within the specified area, but when once she is there the shipowner's duty is fulfilled, and it is not necessary that she should actually reach her loading berth before time begins to run against the charterer. * * *

"(3) The charter-party may specify the precise spot at which the physical act of loading is to take place, such as, for instance, a particular quay, pier, wharf, or spot, or, where the loading is to be performed by means of lighters and the ship is not to be in a shore berth, a particular mooring. In this case the ship is not an arrived ship, and the charterer's obligation to provide a cargo does not arise until she has actually reached the precise spot specified in the charter-party. The same principle applies when the actual loading berth is to be named by the charterer. In this case the charterer must name the berth within a reasonable time, otherwise he is liable for the consequences of his neglect or refusal to do so."

See also: *Scrutton on Charter Parties,* 8th Ed., Art. 39, p. 112.

An examination of the cases cited by counsel in the lower court and which no doubt will be cited here, will disclose that they fall within one of the three classes enumerated above.

In the case of *Aktieselskabet Inglewood v. Millar's Karri and Jarrah Forests, Lim.,* 9 Asp. 411, 88 L. T. 559, the charter-party provided that the "Inglewood" should proceed to Bunbury, or as near thereto as she could safely get, and there load as customary, always afloat, *at such wharf, jetty, or anchorage as the charterers' agent might direct,* a cargo of timber. The "Inglewood" proceeded to Bunbury and tied up to a mooring buoy in the outer harbor. The charterers ordered her to load at the jetty. The Court held, first, that if the charterers possessed a right to order the ship to a particular place of loading in a port, then the phrase "ready to take on cargo" in the demurrage clause meant "ready alongside the ordered place of loading."

With that doctrine we have no quarrel. The charter-party provided that the charterer had a right to order the boat to a jetty. If it had such right, and the charterer timely, positively and unqualifiedly ordered the vessel to proceed to the jetty, the vessel was not an arrived ship until she arrived at the jetty. The charterer in that case did give a direct, positive, timely and unqualified order.

Demurrage, therefore, ordinarily would not have commenced to run until the "Inglewood" arrived at the jetty. The "Inglewood," however, we may say, was allowed demurrage in that case, for the reason that other vessels employed by the charterer were lying at the jetty and prevented the "Inglewood" from going alongside. The Court said:

> "If a ship is prevented from going to the loading place, which the charterer has the right to name, by obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load, and would, but for such obstacles or engagements, begin to load at that place."

In *Nelson v. Dahl,* 12 Ch. Div. 568, 4 Asp. 172, the charter- party provided that the vessel should proceed to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver to the charterers the cargo. Before the ship arrived in the Thames the charterers endeavored to procure a berth for her to discharge in the Surrey Commercial Docks, but owing to the crowded state of the docks, they were unable to do so, and when she arrived she was unable to get into the docks, and had to lie out some time in the river at the Deptford buoys. Eventually the cargo was discharged by lighters, employed by the shipowners, into the Surrey Com-

mercial Docks. The Court proceeded to enquire, first, as to under what circumstances a ship might be considered an arrived ship. It announced the law in accordance with the statement hereinabove quoted from Halsbury's Laws of England (Vol. 26, pp. 182, 183, 184). It further held, however, that under the language of the particular charter-party, the vessel was not compelled to await a loading berth at the Surrey Commercial Docks, and that consequently it was the duty of the charterer to take delivery of the cargo by lighters at the Deptford buoys, for that was the place *near to the Surrey Commercial Docks where the vessel might safely get.* Demurrage was, therefore, allowed the shipowners.

In *Tharsis Sulphur and Copper Co. Ltd. v. Morel Brothers & Co. and Richards & Co.,* 2 Q. B. 647, 7 Asp. 106, the charter-party provided that the shipowner should load the copper ore at Huelva, "and being so loaded shall therewith proceed to the Mersey (or so near thereunto as they may safely get) and deliver the same at any safe berth in the dock at Garston." On arrival of the vessel at the Garston dock the charterer promptly, positively and unqualifiedly named a berth at which the boat was to be discharged. Every berth, however, in the Garston dock was full and the vessel was detained

some time in getting a berth. The Court held that inasmuch as the charter-party gave the charterer the right to name a berth, the ship was not an arrived ship until it reached the precise loading berth named.

In *Leonis Steamship Co. Ltd. v. Joseph Rank, Ltd.,* (1918) K. B. 499, the charter-party provided that the charterer had the option of loading a cargo on the "Leonis" at Bahia Blanca. The vessel went to Bahia Blanca and anchored in the river within the port about three ship's lengths from the railway pier. The Court held that the provision of the charter-party implied that the vessel was to go to a usual loading place in the port, and that the place to which the captain went was *not* a usual loading place.

In *Anderson v. Moore,* 179 Fed. 68, the charter-party provided that the vessel should go to Newcastle, N. S. W., take on a cargo of coals, "and being so loaded, shall proceed to San Francisco Harbor, Cal., to discharge at any *safe wharf or place* within the Golden Gate, and deliver the said full and complete cargo in the usual and *customary* manner at any safe wharf or place, or into craft alongside, *as directed.* * * * To be discharged as *customary, in such customary* berth as consignees shall *direct.*" The "Columbia" was chartered

on June 26, 1907, but the coal which she carried had been sold to the Western Fuel Company under a contract made on November 24, 1906. When the "Columbia" arrived at San Francisco, J. J. Moore, the president of the chartering company, told the captain of the vessel that the cargo of coal had been sold to the Western Fuel Company and that the ship would dock at their bunkers. This, the charterer in that case had a perfect right to do, for the charter-party provided that the coal was to be discharged in such customary berth as the consignees should direct. Prior to the time of the arrival of the "Columbia," however, there had been a coal famine, and at the time of her arrival the dock at the bunkers of the Western Fuel Company was filled with vessels carrying coal. "It was shown to be the custom of the port that vessels arriving in port were discharged in the order of their arrival, and this custom was observed in the present case, with the unimportant exception that a schooner which arrived after the "Columbia" was permitted to discharge 300 tons at the Western Fuel Company's bunkers on February 22nd, a national holiday." The Court said:

> "When did the lay days begin to run? Under the charter-party they did not begin to run until the ship was 'ready to discharge' *'in such customary berth as the consignee shall direct.'* The court below held, and we find no error in

> its conclusion, that under such a provision in the charter-party the vessel is not ready to discharge until she is in position to deliver her cargo to the consignee in the berth which he designates to her."

We have no quarrel with that case. Under the terms of the charter-party the charterer or consignee had a right to direct that the vessel should be discharged a tthe dock of the Western Fuel Company. She was to be discharged as customary and it was proven to be the custom that vessels should await their turn. The charterer timely and positively exercised his option of naming the berth, and the vessel was discharged in her turn.

But how are these cases applicable to the facts in the case at bar? We admit that the charterers were entitled to designate a usual, safe loading place on Puget Sound at which the "Ostrander" was to be loaded. But can it be said that they could delay indefinitely, after they had been given notice of readiness of the boat to load, the naming of such loading place? If so, they might have delayed the naming of such a place for the period of a year and still not be liable for damage accruing by the detention of the vessel. The charterers, it is true, had the option of ordering a boat to any safe, usual loading place on Puget Sound, but they should have given a prompt, direct, positive, abso-

lute and unqualified order. Did the charterers give such an order in this case? Let us see. The charter-party provided that the vessel should proceed "to a loading place on Puget Sound to be designated by charterers prior to June 30, 1917," (Charter-Party, line 6) "for a voyage from a usual safe loading place on Puget Sound (Washington) as *ordered* by charterers or their agent." It will be noted that the charterers had a right to name only one loading place, and that this loading place was to be named prior to June 30, 1917. We make no point, however, of the fact that a loading place was not named prior to June 30, 1917. We are frank to say that we do not believe that the naming of the loading place prior to June 30th was a condition precedent; but even if it were a condition precedent, we think the shipowner in this case has waived compliance therewith by the charterers.

On the same day the charter-party was executed Hind, Rolph & Company entered into a contract of purchase with the Douglas Fir Exploitation and Export Company. This contract provided that the cargo might be loaded at not more than two accessible loading places in any one district where vessel can safely lie always afloat. (Libelant's 1-Q.) On May 26th Hind, Rolph & Company wrote Mr. Ostrander as follows:

> "In order to arrange for the *despatch in accordance with the charter,* at the loading port, *we have had to agree that the vessel would load at TWO mills.* The two mills, of course, will be in the same *district,* so that the shift can be made within a very short time. In view of this circumstance, we hope that in due time you will be able to permit loading at a second mill." (Libelant's 1-B.)

At the very outset, therefore, it will be noticed that the charterers were announcing that although the charter-party provided for loading at only one port, yet the charterers, in order to obtain despatch for the boat, would have to load at two ports. On June 28th, Mr. Ostrander in a letter to Hind, Rolph & Company said:

> "You wrote some time ago asking for the privilege of two loading ports, and while I should very much prefer to load at one, I will, of course, in case of absolute necessity, agree to a second." (Libelant's 1-D.)

Six days prior to the date of the last letter, the Douglas Fir Exploitation and Export Company had placed its contract for the purchase of the lumber with Charles Nelson Company. That contract provided that the lumber was "to be delivered at Mill wharf at *Mukilteo and Port Angeles.*" (Libelant's 1-R.) On July 2nd, four days after Mr. Ostrander wrote his letter to Hind, Rolph & Company agreeing, in case of absolute necessity, to load at two ports, Hind,Rolph & Company wrote Mr. Ostrander as follows:

> "In regard to the loading would say that it has been necessary for us to receive this cargo at two ports, so that with your permission we will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills & Timber Co., Port Angeles." (Libelant's 1-E.)

On August 13th Mr. Ostrander notified Hind, Rolph & Company, by telegram, that the vessel would be ready for cargo by August 25th. (Libelant's 1-F.) On August 14th Hind, Rolph & Company wrote Mr. Ostrander as follows:

> "Owing to the strike situation, we do not known at present just how far the mills have gotten along with this cargo but we have asked to be defintely advised and will let you know as soon as possible all particulars." (Libelant's 1-G.)

Up to this point, at least, it will be noticed that Hind, Rolph & Company have been claiming an option not provided for by the charter-party, namely, the right to load at *two* mills, and wherever the mills have been named the Crown Lumber Company at Mukilteo had been named first.

On the 16th of August (Libelant's 1-H) Hind, Rolph & Company wrote Mr. Ostrander saying that they were just in receipt of the following letter from the Douglas Fir Exploitation and Export Company:

> "Acknowledging your favor of the 14th, this cargo has been placed by us with the Charles Nelson Co., who in turn placed it with the Port Angeles Mill, but now that the strike has come on since this has been done, it is just possible that when the labor troubles are over and the mills are again able to operate, they may want to cut part of its at *Mukilteo* and part at *Port Angeles,* which will be their privilege to do. If, however, the vessel insists on going to the mill, she may go to Port Angeles, *but her lay days cannot commence to count until the mill is able to take care of her, this, on account of the general strike.*"

The letter from Hind, Rolph & Company continues:

> "We are sorry that owing to the strike situation, there is a possibility of the vessel being delayed, but hope that the mills will be able to load the vessel when she is ready."

Now, in the first place, it will be noticed that the Douglas Fir Exploitation and Export Company placed the contract for the cargo with the Charles Nelson Company, who in turn placed it with the Port Angeles mill. The contract of June 22nd, however, (Libelant's 1-R) shows that the contract for the lumber was placed, not at the Port Angeles mill only, but at *Mukilteo* as well. The statement, however, that "if the vessel insists on going to the mill, she may go to Port Angeles, but her lay days cannot commence to count until the mill is able to take care of her, this, on account of the general

strike," is the order relied upon by cross-appellees in this case and which, it is claimed, directs us to go to a usual, safe loading place on Puget Sound. It is, however, not a direct, positive and unqualified order. It is true that it says that if the vessel insists on it, she may go to the Port Angeles mill; *but there is tacked onto this order the qualification that if the vessel does so, she is to waive all claim for demurrage.* The charterers, it is true, in this case had the option of ordering the vessel to go to Port Angeles. But that option did not carry with it the further option that the shipowner should waive that which was justly due him if he complied with the direction given him. Suppose the "Ostrander" had gone to Port Angeles on August 25th. When her cargo would have been delivered to her, no one knows; for it is the contention of the respondents in this case that they were under no obligation to furnish a cargo until conditions at the mills became normal, and it is their further contention that conditions are not normal even now. (See Testimony of Scott, p. 204.) At any rate, we know that a long delay would have occurred in the furnishing of the cargo. The charterers would not have voluntarily paid demurrage. When Mr. Ostrander sought to recover it, the defense of the charterers unquestionably would have been that having gone to Port Angeles, he had waived any

claim for demurrage. The only attempt made to answer our contention that we were entitled to an order which did not have attached to it an assertion that by obeying same we were to relinquish a sum of money justly due us, is that such assertion was "merely an expression of a legal opinion, with the correctness of which libelant was at liberty to disagree." But that is not the kind of an order we were entitled to. We were entitled to a direct and unqualified order, not to one which said, "Obey it, and we will keep the boat as long as we desire, without penalty." In substance, then, the letter of August 16th comes to this: "It is a mere idle and senseless formality for the vessel to proceed to any loading place; but if the vessel insists on complying with this idle and senseless formality, then she may go to Port Angeles. But if she does go to Port Angeles, you thereby waive any claim which you may have, however just, for demurrage." Moreover, the subsequent correspondence between the parties shows that it was not definitely intended that the vessel should proceed to Port Angeles. After the letter of August 16th, Mr. Ostrander offered to cancel the charter-party on terms fair to both parties. (Libelant's 1-J.) This offer was declined by Hind, Rolph & Company because prices had advanced. (Libelant's 1-I.) On September

14th Hind, Rolph & Company wired Mr. Ostrander as follows:

> "Your day letter today: It is difficult for us to assist matters to any great extent from this end but suggest that you communicate with Mr. A. A. Scott, manager of Charles Nelson mill either at *Mukilteo* or Port Angeles regarding the loading." (Libelant's 1-N.)

On the same day they sent Mr. Ostrander a copy of their contract with the Douglas Fir Exploitation and Export Company and a copy of the contract between the Export Company and the Charles Nelson Company. It will be remembered that the contract between the Export Company and Hind, Rolph & Company provided that the cargo might be delivered at the mill wharf *either at Mukilteo or Port Angeles.* In the same letter in which the copies of these contracts were enclosed Hind, Rolph & Company say:

> "As suggested in our telegram, we believe best results can be obtained by your communicating with Mr. A. A. Scott at Port Angeles or Mukilteo." (Libelant's 1-P.)

On September 19th Mr. Ostrander wired Hind, Rolph & Company stating that he would claim demurrage from and after August 25th. (Libelant's 1-T.) To this Hind, Rolph & Company replied as follows:

"Your night letter of 19th regarding charter of Levi W. Ostrander received and our recommendation is that you confer with Mr. Scott placing you vessel in his hands and *waiving your alleged claim for demurrage.*" (Libelant's 1-U & V.)

On September 22nd Mr. Ostrander wired Hind, Rolph & Company as follows:

"Will move vessel to any port on Puget Sound only on receiving orders so to do from you." Libelant's 1-X.)

On October 9th Hind, Rolph & Company wrote Mr. Ostrander as follows:

"We shall furnish the cargo to the vessel at the wharves of the *Crown Lumber Co. at Mukilteo* and the *Puget Sound Mills & Timber Co., Port Angeles,* as soon as the conditions resulting from the strike permit. * * *

"As soon as conditions at the wharves named have become such that the cargo can be delivered to the vessel as fast as she can receive it, we will notify you of that fact so that you may then proceed to the *first loading place* at Mukilteo, in case you desire to keep the vessel at Seaborn Yard, Tacoma, until then.

"We would suggest again, however, that the vessel would save time if, instead of waiting at Seaborn Yard after being ready to load, she proceeded to the loading wharf at *Mukilteo* and there accepted the cargo as fast as the mill will deliver it. We are assured by the mill that it will use its best efforts to give you all possible despatch in the delivery of the cargo.

> "In case, however, the vessel proceeds to the mill before receiving our notice that the cargo will be delivered there as fast as vessel can receive it, it must be understood that you thereby waive provision 'T' (line 81) of the charter-party and *any claims to demurrage.*" Libellant's 1-D[1].)

Now, it will be apparent that at all times after the letter of August 16th it was never ordered by the respondents that the vessel should proceed to Port Angeles. It was at all times said that the vessel would be compelled to load at two ports, the first one of which was Mukilteo, and the direction to proceed to Mukilteo was coupled with the statement that if she did so proceed, all claims for demurrage would be thereby waived. It will also be noticed that on October 9th Hind, Rolph & Company said that the first loading place would be at Mukilteo and that they had been assured that the vessel would be given all possible despatch at that port in the delivery of the cargo. But Mr. Scott testified that the vessel could not have been loaded at Mukilteo because of the fact that "the Crown Company's commitments were all full.. (P. 230.)

However that may be, the record abundantly discloses that no positive, unqualified order was ever given the "Ostrander" to go to any loading place until the telegram of October 12, 1917, when Hind,

Rolph & Company, for the first time, gave a direct, positive and unqualified order that the vessel should proceed to Port Angeles.

In Carver on Carriage by Sea, (6th Ed.) §224, it is said:

> "If the loading port is not named in the charter-party, but remains to be deterined by the charterer, he must, subject to special agreement, name it before he can require the ship to sail. Thus, where she was to proceed to a 'safe port near Capetown,' it was held not to be enough that the charterer was ready to put an agent or supercargo on board, who would give the order later. And if the charterer delays unreasonably in naming the port, he will be liable for the shipowner's loss by the detention of the ship."

The case nearest in point which we have been able to find is that of *Mobile & Gulf Nav. Co. v. Sugar Products Co.,* 256 Fed. 392. In that case the charter covered two vessels and the charterer had the right to name one of two ports of loading. On April 24th the shipowner notified the agent of the charterer that the vessels would be ready in a few days to proceed to port of loading and asked what port they should proceed to. No prompt answer having been received, the master again requested the charterer to name the port of loading. The request was made the third time. On May 3rd, the charterer wired the master as follows:

> "Providing you waive all rights demurrage to date, will load smaller vessel Bahia Honda, larger one Havana."

The master refused to waive his claim for demurrage and again demanded that loading port be named. Eventually one was named. The court said:

> "As the charterer was to provide the cargo for the vessel, it is manifest to me that the option as to port of loading was put into the charter-party for the benefit of the charterer, so that he might direct the vessel to the port at which he had assembled his cargo. I therefore hold that the duty was on the charterer to name the port of loading. It was therefore the *duty* of the *charterer,* when he *knew* the vessels would *shortly be ready,* and was asked as to which port the vessel should proceed, *to inform the vessel promptly,* so that it could proceed without delay."

Other cases involving loading, under the circumstances herein set forth, are probably not to be found. But there are several cases relating to discharge which, while not squarely in point, are with us in principle. The fact that they relate to discharging and not to loading is immaterial.

In the case of *The Silverstream,* Vol. 10, Eastern Law Reporter, p. 73, the owners of the ship "Silverstream" brought an action to recover demurrage. The charter-party provided that the "Silverstream" should proceed to a named port and there load for

another port, as ordered, on signing bills of lading. The charterers ordered the boat to proceed to a port of discharge not named in the bill of lading. The Court said:

> "It seems clear to me that the ship has been detained by the charterers not naming a port of discharge or destination within the charter. Negotiations to agree on a new port failed, the captain being willing to agree to a port of destination not named in the charter provided his right to demurrage at the port of loading was recognized and the amount thereof adjusted. His right to any demurrage at the port of loading was denied, and as I have already decided, wrongfully denied.
>
> "The charter requires the captain, after receiving a cargo, to proceed to one of five ports as ordered on signing bills of lading. The bills of lading have not been presented,—except to a port not named, and the ship has consequently for some time since taking on her cargo, been detained here. This detention could have been avoided at any time by the charterers presenting bills of lading or naming any one of the five ports indicated in the charter, and is detention for which the charterer is responsible."

The note of the reporter to the above case is as follows:

> "It was ordered that the owners of the 'Silverstream' were entitled to demurrage under the charter-party from and including the 7th day of July, 1911, and for every working day thereafter at £14.7.9 per day until a port of destination was ordered as provided in the charter-party."

In the case of *Schele et al v. Lumsden & Co.,* 53 Scot Law Reports, page 581, the facts were that the charter-party provided that the ship being loaded with a cargo of pit props belonging to the charterers should "proceed to a good and safe place in the Firth of Forth and there deliver the same." The charter-party contained a strike clause. The vessel arrived on March 20th. Owing to lack of space it was forbidden to stack props on the quay and it was consequently the duty of the charterers to have cars available to haul the props away as soon as they were unladen. A coal shortage, however, existed, owing to a strike, and the Railroad Company refused to haul cars unless coal was provided for the locomotive. The vessel master refused to pay an exorbitant price for coal and in consequence the vessel did not get in berth until April 9th. The vessel owner having brought an action for demurrage, the charterers contended that the strike clause in the charter-party exonerated them from taking delivery on arrival of the ship. The nisi prius judge held that there was an "absolute obligation" on the part of the charterers so to do. Having been defeated on this point

> "the defenders took another point—*how can one talk* (they say) *of obligation to take delivery on 21st March, seeing that the vessel was not in a berth till 9th April?*"

To this contention the Court gave a sensible answer:

> "If it was the receiver's duty to provide the coal they were themselves the sole cause of the fact that this vessel did not at once occupy a berth on her arrival in dock. *From 20th March onwards both parties knew* (1) *that no business could be done till coal was supplied, and* (2) *that business would begin* as soon as coal was supplied. And as a matter of fact the vessel was actually in her berth when the receivers were ready to do business with her, i. e., on 9th April. I cannot gather that the lack of actual mooring at a berth troubled anyone till the case *came into the hands of the lawyers,* and certainly the receivers neither did anything nor said anything about the ship getting a berth. But Mr. Horne was very emphatic that it was the duty of the ship to go through the *empty form* of getting herself moored to a berth before time could begin to run against the receivers."

In *268 Logs of Cedar,* 2 Lowell, 378, 379, Judge Lowell said:

> "The evidence proves that part of the homeward cargo was discharged at one wharf and part at another; and no objection appears to have been made by the owners of the brig to this mode of unloading, and I assume it to have been proper and according to the usages of the trade. * * * *But it is proved that the charterers neglected for two or three days after the first part of the cargo was taken out to name the place at which the remainder was to be delivered; and for this time they must pay."

THE "ARRIVED SHIP" THEORY NO DEFENSE IN ANY EVENT.

Other considerations compel the same conclusion. Let us assume now, for the sake of the argument only, that the letter of August 16th did constitute a direct and unqualified order, and that the arrival of the schooner at Port Angeles by August 25th, under the circumstances existing in this case, not an "empty form" *(Schele v. Lumsden)* but a condition precedent. Having made such concession, for the sake of the argument, yet even so, the cross-appellant is entitled to recover for demurrage between August 25th and October 15th, for the reason that Hind, Rolph & Company waived the breach of this condition precedent. A waiver of a condition precedent converts the condition precedent into a simple term of the contract and its breach does but give an action for damages, if any damage occur. Manifestly, no damage occurred to the charterers in this case by reason of the vessel not going to Port Angeles on August 25th, and consequently that question is not involved herein.

In the case of *Bentsen v. Taylor, Sons and Co.,* (1893) 2 K. B. 274, 7 Asp. 385, the charter party provided that a ship described as "now sailed or about to sail from a pitch pine port to the United

Kingdom," should "after discharging homeward bound cargo with all convenient speed sail and proceed to a good and safe loading place as may be directed by the charterers at Quebec," and there load a timber cargo for the United Kingdom. The charter party was dated March 29, 1892, and at that time the shipowner and charterers knew that the ship was at or had just left the port of Mobile and was going to Greenock. The ship, however, did not leave Mobile until the 23rd of April. She arrived at Greenock on the 5th of June, sailed for Quebec on the 18th of June, and arrived there on the 7th of August, when the charterers refused to load her. The Court held, first, that the statement in the charter party that the ship had sailed or was about to sail from a pitch pine port to the United Kingdom was a condition precedent. Lord Esher quoted the following from the opinion in the case of *Behn v. Burness,* 3 B. & S. 751:

> "Now the place of the ship at the date of the contract where the ship is in foreign parts and is chartered to come to England may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends on it. For most charterers, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer. In the ordinary

> course of charters in general it would be so: the evidences for the defendants shows it to be actually so in this case. Then if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to *hold it to be a condition precedent* upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend."

Lord Esher then continues:

> "The present case is exactly within these words, and, as there is nothing in the contract leading us to a contrary conclusion, we must hold that this statement is a *condition precedent*. The ship had not sailed, nor was she nearly loaded and about to sail, so that there was a *breach* of the *condition*. The defendants then had a right to treat the contract as at an end, or, if they chose, to treat it as still subsisting."

(So in the case at bar. The charter party provided that "should not vessel have arrived at port of loading on or before twelve o'clock noon of the 31st day of August, 1917, charterers to have the option of cancelling the charter party." If, therefore, the notice was a direct and unqualified order to proceed to Port Angeles and the vessel did not arrive there by August 31st, Hind, Rolph & Company had a right to cancel the charter party, or they could treat it as still subsisting.)

"If they chose to treat it as at an end, they were bound in so doing not to lead the plaintiff to believe that the contract still subsisted. The result of the defendant's letter was to leave the plaintiff under the impression that he was still bound to carry out his contract, and therefore the defendants cannot now treat it as at an end. But if they have sustained any damage through the breach, that matter will be referred to an arbitrator under the agreement made by them with the plaintiff. *The plaintiff is therefore entitled to judgment on his claim for freight, and the defendants to judgment for the plaintiff's breach of contract.*"

Bowen, L. J., said:

"In order to succeed, the plaintiff must show either that he has performed the condition precedent, the onus being on him, or that the defendants have excused the performance of the condition, and we have to consider whether the plaintiff has sustained that burden, so that no reasonable man could doubt that there has been a waiver of the condition or an excuse of its performance. * * * In my opinion the plaintiff has sustained the burden which lay upon him to prove a waiver of the condition, and therefore his appeal ought to succeed, and judgment ought to be entered in the way which the Master of the Rolls has suggested."

Kay, L. J., said:

"If it were necessary to decide this point, I should be of opinion that these words amounted to a condition rather than to a mere warranty. But it is not really necessary to decide the point, for, if there was a condition precedent, *I have no doubt as to the waiver.* * * * The defendants are therefore liable for their refusal to load the ship."

Now in the *Bentsen* case it will be noticed that the ship did not take on board a cargo at all, but that the Court held that the shipowner was entitled to the freight for the voyage contemplated by the charter party. It said, however, that if the charterers had suffered any damage by reason of the fact that the vessel did not sail from Mobile until some considerable time after the charter party declared she had sailed, the charterers were entitled to such damage as an offset. It also held, however, that if the charterers subsequently ascertained that the vessel had not sailed from Mobile and did not declare the contract at an end, as they had a right to do, they had waived the condition precedent.

Now in the case at bar Hind, Rolph & Company certainly knew that the "Ostrander" did not go to Port Angeles on August 25th. They therefore waived the condition precedent. If they suffered any damage by reason of the fact that the "Ostrander" did not go to Port Angeles on August 25th, that damage might be recovered. But the evidence, of course, discloses that they suffered no damage. It would be difficult to advance an argument which would allow the shipowner in the *Bentsen* case to recover his freight money for a cargo which he never carried, and deny to libelant in this case his claim.

In the case of *Atlantic & M. G. S. S. Co. v. Guggenheim,* 123 Fed. 330, the shipowner brought an action for demurrage. The contract between the shipowner and the charterers provided that "we are to keep the vessels a regular period apart as much as possible, giving you full information as to their movements." The charterers in that case contended that the vessels were not kept a regular period apart and that the delay in loading was caused thereby. The Court said:

> "It is conceded by the respondents that they did not avail themselves of any right of cancellation they might have had but they contend that they did not by their conduct deprive themselves of a right to claim damages for a breach of the contract and to set them up by way of defense in this action, citing Scrutton on Charter Parties (4th Ed.) p. 60. The principle involved is there stated:
>
> '*The breach of a condition precedent* being waived by one party in so far that he does not repudiate the contract converts the condition precedent into a simple term of the contract, its breach giving an action for damages.'
>
> The respondents, however, have not proved that they had suffered any damages, nor do they seek to offset any claim of that character, but to defeat the libelant's right of action or to substantially reduce its recovery. It is not clear that they would be entitled to do so, if there were any merit in the claim, which is doubtful. The respondents accepted the vessels and loaded them, without demur or protest, and paid the freight earned on all three trips

> without a suggestion that there had been any breach of contract or that they had suffered any damages by reason of the late arrival of the vessels at Pensacola."

So in the case at bar. Mr. Ostrander, in August, offered to cancel the charter on terms fair to both parties. Hind, Rolph & Company refused. Again, *after* the schooner arrived at Port Angeles, Hind, Rolph & Company wired Mr. Ostrander that "We wish it distinctly understood we are not abandoning charter." It is true that at that time they insisted they were not liable for demurrage, but their claim to exoneration was based upon the *strike clause* and not upon the fact that the ship was not an "arrived ship" until October 14th. The "arrived ship" reason for exoneration did not "trouble anyone till the case came into the hands of the lawyers." (*Schele v. Lumsden, supra.*)

We maintain, therefore, *first,* that Hind, Rolph & Company never gave a direct and unqualified order to the schooner to proceed to Port Angeles until October 12th; that the letter of August 16th did not constitute a direct and unqualified order; and, *second,* that even if the letter of August 16th did constitute a direct and unqualified order, and the arrival of the schooner at Port Angeles was a condition precedent to the right to recover, yet Hind, Rolph & Company had waived compliance with such condition

precedent and by such waived such condition precedent became but a term of the contract, a breach of which would render us liable in damages to Hind, Rolph & Company if such damages occurred (which is not the case), but would not constitute a defense to our claim for demurrage.

We submit, therefore, that cross-appellant is entitled to demurrage for the period between August 25th and October 12th.

Respectfully submitted,

CHADWICK, MCMICKEN, RAMSEY & RUPP,
Proctors for Appellee and Cross-Appellant.